IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 491.

SAMUEL PINE AND FREDERICK MULLER,
Appellees,

AGAINST

THE CITY OF NEW YORK AND BIRD S. COLER, as Comptroller thereof,
Appellants.

BRIEF FOR APPELLEES.

Statement.

This case and the record therein have been brought before this Court by virtue of its writ of *certiorari*, issued upon the petition of the appellants above named, January 8, 1902, to the Judges of the United States Circuit Court of Appeals for the Second Circuit. The suit was brought in the Circuit Court of the United States for the Southern District of New York in Equity, for an injunction restraining the Mayor, Aldermen and Commonalty of the City of New York, a municipal corporation of the State of

New York, from building a certain dam in the State of New York, on the west branch of the Byram River, and from maintaining the same and from diverting the waters thereof. The said municipal corporation, pending the suit, became by legislative enactment the City of New York. The controversy in the case turns on the right of the City, under certain statutes of eminent domain enacted by the Legislature of the State of New York, to divert, for the purposes of its municipal water supply, by a dam erected in the State of New York, near the boundary line, between that State and Connecticut, the west branch of the Byram River, a non-navigable, interstate stream, rising in the State of New York and traversing the territory of that State and of the State of Connecticut.

The testimony having been taken in the usual manner before one of the examiners of the Court, the case came on to be heard at a term of the United States Circuit Court for the Southern District of New York, and was argued before the Honorable Nathaniel D. Shipman, whose opinion thereon was rendered in favor of the complainants (the appelles here) (see Record, p. 204). The decree of the Circuit Court was entered thereon, granting the injunction prayed for in the bill, all the parties consenting as to the form of said decree (see Record, p. 209). Said decree was filed July 28, 1900. The defendant appealed to the United States Circuit Court of Appeals for the Second Circuit and the appeal was argued at the October term of said Court, 1900, and by the decision of that Court, rendered October 30, 1901, the decree of the Court below was affirmed (see Record, p. 221). Mr. Justice Wheeler filed a dissenting opinion (see Record, p. 233).

The complainants are the owners of separate freeholds in the State of Connecticut through which or along which the Byram River flows. Said river is a non-navigable stream and is made up of two branches, the aforesaid west branch and the east

branch. The east branch rises in and flows wholly in the State of Connecticut. The west branch rises in the State of New York and flows southeasterly into the State of Connecticut. The east and west branches flow together in the State of Connecticut on the farm of the complainant Muller, about four miles distant southeasterly from the boundary line between Connecticut and New York. At their point of union on Muller's farm they form the Byram River, which flows thence southeasterly through Muller's farm. About a mile below Muller's farm, it strikes the farm of the complainant Pine and flows along this farm, the middle line of the channel forming the easterly boundary thereof (fol. 33), and thence onward to Long Island Sound.

At a point about seven hundred feet north of the boundary line between the two States (fol. 9), and within the State of New York, the City of New York began the construction of a dam across the said west branch of the Byram River to divert the waters thereof from their natural channel to the City of New York. Long before said dam was near completion, and in March, 1896, this suit was commenced.

The answer admitted the allegation of the bill that the City was in 1896, at the time the bill was filed, building the dam which it avers was not then near completion (fol. 16).

It admitted that when completed the City intended by it to divert all the water of said west branch.

The language is, "It admits that it intends to "divert some or all of the water of said west "branch from its natural channel" (fol. 17).

It admitted that the complainants were injured and damaged. Its language is, "The *diversion of* "*water of said branch would cause but little if any* "*injury and damage to the complainants or either* "*of them*" (fol. 17),

It admitted complainants were damaged, denying only that they were damaged as much as $2,400 and more in each case (fol. 18).

It admitted that complainants were damaged by pleading its willingness to pay damages (fol. 19).

Nothing was set up by way of affirmative defense in the answer, and nothing was denied that was alleged in the bill except—

That the damage was as great as alleged therein.

The city did not plead the statutes of New York, authorizing it to condemn land and property for the purpose of its water supply, under which statutes it presumes to justify. It read in evidence, however, Chapter 445, Laws of New York, 1877 (fol. 5 A and fol. 138). This and certain statutes amendatory and supplementary on which the City relies are set forth at length in the City's brief (p. 86).

From the answer it would seem that the only issue raised by the City was the amount or extent of damage. If the complainants are right in their claim (and it is their claim) that this question of the amount or extent of their damages does not affect their right to their injunction, they are entitled to their decree (see Points *infra*, and cases there cited) without proof of pecuniary damage.

Much testimony, however, has been taken touching the point of the amount or extent of the injury which bears on the amount of the damage. Indeed, substantially all the testimony relates to the point of injury and damage. With a view to facilitating such examination of the testimony as the Court may desire to make, the following matters are suggested:

> NOTE.—In fols. 67–119, pp. 23 to 39 of the printed pleadings and proofs, will be found minutes of a conference between Mr. Williams, one of the solicitors for the complainants, and Gen. Charles H. T. Collis, then Commissioner of Public Works, and George W. Birdsall, Chief Engineer of the Croton Aqueduct, also certain letters by General Collis and Eugene E. McLean, an engineer in the employ of the Comptroller to

the then Comptroller, Hon. Ashbel P. Fitch. These minutes and letters appear to have been submitted by solicitors for complainants. As testimony the minutes would seem to be incompetent and open to the objection made by the defendant's counsel (fol. 115). At any rate they show nothing more than attempted negotiations between some of the Connecticut riparian owners and the City of New York. At folio 76 will be found a stipulation between Mr. Williams and General Collis that any statement made by Mr. Williams at the interview covered by the said minutes should not be used against his clients, the owners, in the event of litigation. The negotiations evidenced by the minutes seem to have come to nothing, for the trial of this cause, which was at issue at the time of the conference, has proceeded.

The letters of General Collis and of Mr. McLean, the Comptroller's engineer (fols. 95, 98 and 100), are, it is submitted, competent evidence of the views and opinions of those eminent officials in respect to the claim of the complainants and the injury inflcted upon them, even though those letters may not bind the City of New York as claimed in the objection of defendant's counsel (fol. 118).

The chief witness called on behalf of complainants was George W. Birdsall, Esq., Chief Engineer of the Croton Aqueduct of the City of New York. It is submitted that the utmost credibility should be given to this witness as a distinguished official of the defendant and obviously a witness not in sympathy with the complainants.

The current of the Byram River and the west branch thereof have long been utilized for manufacturing purposes. Mills at Portchester, at Glen-

ville, the mills of Reynolds, of Wilcox, of Birdsall, Ward & Company, Tingue, House & Company, are all referred to in the testimony. Much of the land along the valleys is, however, occupied by farms. The complainants are the owners, respectively, of two of these farms. The farm of the complainant Muller is intersected by the west branch of the Byram River, and by the east branch and by the main stream, which the two branches unite to form on his property. His farm embraces forty-five acres of land (fol. 356). He owns on each side of the river, *i. e.*, the west branch and the main stream, 1,145 feet, or altogether on both sides 2,290 feet. His farm is used exclusively for farm purposes, and the streams are used for domestic purposes, and for the watering of his stock (fol. 356). His farm is valued by the witnesses for the city at $6,600 (fol. 515). The farm of the complainant Pine is located on the main Byram River about a mile below the junction of the east and west branches on the farm of Muller. It embraces about one hundred acres (fol. 391), and extends along the west side of the river 3,725 feet ((fol. 33). It is in general cultivation (fol. 392), and the complainant Pine maintains upon it about thirteen head of horses and cattle. This farm has on it deposits of feldspar, and, in addition to his farming, the complainant Pine carries on the manufacturing of feldspar (fol. 34). He opened the feldspar quarry about five years ago and constructed his mill, which is operated by steam generated from water drawn from the Byram River. His manufacturing business is profitable (fol. 342). Much of his farm consists of pasture lots which are laid out along the river. There are no springs upon the farm of the complainant Pine, and no other water excepting a swamp and a well (fols. 345, 346).

The west branch of the Byram River is fed by two ponds or lakes lying in Westchester County, New York, to wit, Wampus Lake and Byram Lake, whose outlets unite some distance north of the Con-

necticut State line to form said west branch (fol. 130). Wampus Lake has an area of 20 acres (fol. 133), Byram Lake of 120 acres (fol. 135).

The City has built a dam across the west branch of the Byram River in New York near the Connecticut State line, the purpose of which is to divert and carry off all the water of said west branch (fols. 136, 137, 547). The dam can divert at least 8,000,000 gallons per day (fol. 139). Before this dam was built by the City of New York, all this water flowed through or by the lands of the complainants in the natural channels of the west branch and the main Byram River, except so much as was lost by absorption (fol. 140). The dam in dispute has been constructed at an expense of $45,000 (fol. 141). The east branch of the Byram River has not been affected, but it is the least valuable of the two branches. It is not fed by lakes (fol. 133). It flows through a rough narrow valley with very little low ground (fol. 377). Its current in the summer has been known to flow through an auger hole one and one-half inches in diameter (fols. 378, 379). It has been known to be almost entirely dry, just a little water percolating through the bed (fol. 174).

The west branch had the qualities of a valuable stream. In addition to being fed by lakes its flow in the first and longer part of its course is through swampy lands (fol. 378). The swamps lie up above the City dam (fol. 239).

It is in evidence that swamp lands along the course of a stream tend to make the flow more uniform, not only contributing water, but holding the water like a sponge and letting it off gradually down the bed of the stream, and thereby equalizing the flow, especially through the dry seasons (fols. 305-306, 433).

It is therefore submitted in behalf of complainants that of the two tributaries of the main Byram River, by far the most valuable in respect to volume, uniformity and quality of water, is the west branch, which the City at the State line has wholly cut off,

diverted and appropriated. Even that part of the west branch lying below the City dam, which is left to feed the Byram River, has, according to undisputed testimony, a course through dry territory, void of marsh lands and tributary streams (fols. 377, 382, 242). The flow of the lakes, the storage of the swamps and their equalizing influence have all been cut off and lost to the west branch by the construction of the defendant's dam near the State line.

The destruction of the west branch as a tributary of the Byram River being both admitted and proven, the attention of the Court is asked to the effect upon the Byram River.

The testimony of Mr. Birdsall is clear that the average flow down the Byram River prior to the diversion was 24,000,000 *gallons per day* (fols. 1A-17A, 42-54, 120-170), *and that the diversion by the City is* 8,000,000 *gallons per day, or one-third of the flow of the entire main stream.* These facts are substantially proven by the City's own witness, Fred. K. Betts, assistant engineer.

This testimony of Mr. Birdsall, the City's own chief engineer, is not disputed by the defendant nor is any attempt made to disprove it. The only witness called by the City in reply to Mr. Birdsall is Mr. Frederick K. Betts, an assistant engineer (fols. 398–434).

Mr. Birdsall, for the complainants, testifies in substance:	Mr. Betts, for the defendant, testifies in substance:
That the drainage area of the west branch above the City dam is 8.66 sq. m. (fol. 7A).	
The drainage area between the State line and the junction of the east and west branch is about 4 sq. m. (fol. 4, &c.), making a total	The drainage area diverted by the City is 8.66 sq. m. (fol. 407).

drainage area of west branch about 12 sq. m. That the water flow on the west branch, and generally in the neighborhood of Byram River and its branches is an average of 1,000,000 gallons per day for each square mile of drainage area, making the flow of the west branch at its junction with the east branch 12,000,000 gallons per day (fol. 122).

That the drainage area of the east branch is between 7 and 12 sq. m. (fols. 47, 126, 127). (It follows that its average flow at its junction would be from 7,000,000 to 12,000,000 gallons per day.) That the total maximum average flow of the main Byram River at the junction of its two branches is 24,000,000 gallons per day, to wit, 1,000,000 gallons per day for each of the 24 sq. m. of drainage area. The diversion by the City dam being 7,660,000 gallons per day, the decrease in the flow of the west branch of the Byram River just above the junction is in the proportion of 7,660,000

That the drainage area of the main Byram River and its branches *north of the land of the complainant Pine and exclusive of the drainage area diverted by the City* is 18.22 sq. m. (fols. 417, 418). As this witness also estimates the daily average flow at 1,000,000 gallons (fol. 428–429) the total maximum flow of the Byram River and its branches at the land of Mr. Pine before the diversion by the City would be 18,220,000 plus 8,660,000 gallons, equals 26,880,000 ~~28,000,000~~ gallons per day.

gallons to 12,000,000, or about 2-3 (fol. 124). Just below the junction the decrease in the flow of the main stream would be "*more than* ½" (so Mr. Birdsall expresses it. Obviously it is as much as ½).

The difference between Mr. Birdsall's figures, 24,000,000, and Mr. Betts' figures, 26,880,000, is accounted for by the fact that Mr. Birdsall computes the flow at the junction of the east and west branch, and Mr. Betts computes the flow at a point on Mr. Pine's land a little further down the river, and obviously embracing a greater drainage area.

It is therefore clear that by the defendant's own testimony, the flow of the main Byram River by the land of Mr. Pine is decreased on an average 7,000,000 to 8,000,000 gallons out of an estimated total of 26,880,000 gallons per day, or between ¼ and ⅓.

But it must be considered that Mr. Betts allows as large a drainage flow for the drainage area between the junction and Mr. Pine's land as is allowed by him and Mr. Birdsall above the junction, to wit, 1,000,000 gallons per day per square mile of drainage area. This is obviously improper and unjust to the complainants, for they prove by undisputed testimony, as already shown, that the *lower part* of the west branch, *all the east branch and the main river between Mr. Pine's and the junction flow through a comparatively dry territory devoid of swamp lands and contributory streams or springs.* The copious, constant and equal flow belonged to the west branch above the State line because of the lakes and the swamp lands there, and this flow the City has wholly diverted.

The west branch at a point immediately below the dam is dry. The entire current has been seized and

diverted by the City, and the City makes no claim to the contrary, but admits that it will take all the water.

Fols. 236, 237, 238, 255, 256, 349, 350, 351–352 (see Answer, fol. 17).

The practical effect of this destruction of the west branch upon the current of the main stream is testified to by complainant's witnesses, and their testimony is undisputed.

The witness Knapp, who was reared on the banks of the east branch (fol. 174), and who has lived most of his life in the immediate neighborhood of the Byram River (fols. 196, 197 and 198), testifies that before the diversion and in the summer season the main Byram River had a sufficient flow to cover its bed of twenty-five feet in width (fol. 177). In the winter season the current ran about two feet deep (fol. 177). The condition of the bed of the Byram River along the property of Mr. Pine, after the diversion by the City, is clearly shown in the photograph, Complainants' Exhibit 1, October 26, 1899 (fol. 359). At folios 343, 344, the witness Johnson testifies to the condition of the main stream as nearly dry at times in the past two years (that is since the date of the diversion, 1896) (fol. 407).

The City admits that it has paid damages to many of the riparian owners along the Byram River in Connecticut, but that these were all mill owners (fol. 168). It admits that it paid damages to the mill owner, Reynolds, adjoining Mr. Pine, and whose mill prior to the diversion by the City was operated by the mill pond which abuts on Mr. Pine's land and is formed by a dam on the Byram River, near the southerly line of Mr. Pine's land (fol. 373). (See fols. 361–374).

It is alleged in the complainant's bill (fol. 5) that valuable mill sites and other valuable rights and privileges are owned by the complainants on said Byram River. This allegation is not denied by the

answer (fol. 18), but it is there alleged that the mill sites are of little, if any, value. No testimony was introduced on this point by the defendant. The complainants put on the stand one Lawrence B. Jenckes, Superintendent of Public Works for the City of Stamford, and a civil engineer, whose competency as such was admitted by the defendant (see fol. 261). Mr. Jenckes' testimony (embraced in fols. 260-338 and fols. 387-388), is to the effect that if the complainant Pine could secure the right to flood the adjoining lands, to wit, the lands opposite his ownership on the Byram River, he could, by damming the said river, create a pond with sufficient water to develop 33 horse-power, provided the water diverted by the City is restored. At folio 387 complainants' counsel read in evidence the statutes known as the Flowage Acts of Connecticut, to wit, Chapter 26, Public Acts of Connecticut, 1863 and 1864, approved July 6, 1864; also General Statutes 1875, Chapters 472-473-474; General Statutes of Connecticut, 1880, Chapter 92; General Statutes of Connecticut 1875, Chapter 234, Section 18; General Statutes of Connecticut, approved 1887, in force 1888, Sections 1216-1225 and Section 2687. At folios 361-374, the witness Johnson testifies as to the size of the pond abutting on Mr. Pine's land near his southerly boundary owned by one Reynolds, which, prior to the diversion by the City, furnished water to operate the neighboring mill of Reynolds. This testimony taken in connection with the Flowage Act of Connecticut and the testimony of the witness Jenckes is submitted as proving the feasibility of constructing a mill pond on the land of Mr. Pine capable of developing a 33 horse-power provided the present diversion by the City is enjoined.

In addition to the witness Betts, whose testimony has been considered above, the only material witnesses produced by the defendant were the witnesses Banks, Hoyt and Austin. The apparent object of the testimony of these witnesses is to contra-

dict in part the testimony of the witness Knapp for the complainants. The witness Knapp, as a real estate expert and as a resident of the neighborhood, testified to a value of some $15,000 for the farm of the complainant Pine (fol. 182), and that the damage to Mr. Pine by reduction of the flow of the Byram River caused by the diversion by the City was 30 per cent. of the said value of $15,000 (see fol. 202, fol. 196, fol. 218). The witness Knapp admitted that he had not, in reaching his estimate of value and of damage, taken into account the manufacturing industry, to wit, manufacturing feldspar, carried on by the defendant Pine on his farm (fol. 195), and had not considered the availability of Mr. Pine's property for a mill site, nor the utilization of the natural flow of water through it for manufacturing purposes (fol. 213). To meet this testimony the City introduced the testimony of Messrs. Banks, Hoyt and Austin. Mr. Banks testified to the value of Mr. Pine's farm as $10,000 (fol. 444), and the value of Mr. Muller's farm as from $5,000 to $6,000 (fol 447), and that the diversion by the City had no effect on the market value of these properties as there was sufficient water left for all purposes. Upon cross examination (fols. 458, 467) the witness Banks admitted that he had valued the farms only for farming purposes, and that he had not allowed anything in his estimate of value for the deposits of feldspar on the farms or for the manufacturing facilities of Pine (fol. 468). He also testified (fol. 482) that he had not allowed any value to Mr. Pine's land in view of the possibility of constructing a mill pond and securing water power, and that if that could be done it would increase the value of the property in his judgment and consequently would increase his loss and damage (fol. 483). The witness Hoyt, after testifying that the diversion of the water did not make any difference in the value of the complainants' property (fol. 510), admitted (fol. 516) that he did not know how much water had been diverted; that he had been told that

about one-quarter of the water had been diverted (fol. 518), and that he did not know how great the flow was since the diversion. He admitted that he had made his estimate of value and of damage upon the assumption that a mill pond could not be created on Mr. Pine's present ownership (fol. 524), and that if the Flowage Statutes of Connecticut made it possible for Mr. Pine to establish water power upon his premises, the witnesses' estimate of value and damage would be changed. The witness Austin, after testifying that the complainants had not been damaged, admitted that if there were *future purposes* to which they might desire to put the natural flow of water, then it would be of benefit to them to have the natural flow undiminished by the diversion of the City (fol. 535). At this same folio this witness for the City sums up the case for the complainants in the pregnant phrase, "*I should say the more water there was the more value.*"

THE VERY POINTS UPON WHICH THE LEARNED TRIAL JUSTICE FOUND FOR THE APPELLEES ARE SUPPORTED NOT ONLY BY THE TESTIMONY BUT BY THE ADMISSIONS IN THE PLEADING OF THE CITY. THUS THE CITY BY ITS ANSWER ADMITS THE BUILDING OF THE DAM. IT ADMITS ITS INTENTION TO DIVERT THE WATER OF THE WEST BRANCH OF THE RIVER. IT ADMITS THAT THE COMPLAINANTS ARE INJURED AND DAMAGED, AND NO AFFIRMATIVE DEFENSE IS SET UP.

An examination of the appellants assignment of errors (p. 211) discloses the following claims:

I.—That the loss or damage of the complainants is not large enough to warrant the granting of an injunction (Assignments 1, 2, 3, 7, 8, 10, 13).

II.—That there is in the Court a power to compel the complainants to accept compensation for such damages as might be found to be sustained by them (Assignment 4), and that the public neces-

sities of the City of New York requiring that the complainants be divested of their property rights for the benefit of said municipality (Assignments 5 and 6), the Court should refuse the injunction and compel the complainants to accept damages.

III.—That the diversion being done in the State of New York under an act of the Legislature of that State and under its power of eminent domain, the Federal Courts have no power to enjoin such diversion (Assignments 9 and 12).

IV.—That there is an improper joinder of parties complainant, and that the bills should therefore have been dismissed (Assignment 11).

V.—That the Court erred in admitting improper testimony, and excluding proper testimony as to the defendant (Assignment 14).

These five points cover all the errors assigned by the city in the Circuit Court of Appeals, and it may be said embrace substantially all the points in the controversy.

I.

The case is one of riparian property and rights, which in the law are now and always have been *sui generis*. The decision must rest upon the rules and principles of the laws of riparian property as applicable to an interstate stream.

In this case a private interstate water-course has been diverted at the boundary line of the two States

whose territories it traverses. The aggressor in the one State and the injured parties in the other State are before a Federal court with their controversy. It is necessary to inquire first as to the characteristics which the two States by their respective systems of law have stamped upon that natural object which is the subject of the controversy. What are the elements which constitute property in the water course in question?

They are three by the law of both States, as they were three at the common law.

(*a.*) Each riparian owner has a right that the stream shall flow as by nature it was wont to flow.

(*b.*) Each riparian owner has the right to the use of the water, but the use of the water is limited to riparian uses.

(*c.*) If the water-course is diverted or obstructed, a legal wrong is done at the point where the effect of the diversion is felt or the injury sustained.

(*a.*) *Concerning the point that each riparian owner has a right that the stream shall flow as by nature it was wont to flow.*

"The riparian owners of lands adjoining fresh "water, non-navigable streams, take title, '*ad* "'*usque filum aquæ*,' to the thread of the stream, "and thereby acquire the right as incident to such "title to the usufructuary enjoyment of undi- "minished and undisturbed flow of such water. "'Fresh rivers of what kind soever do of common "'right belong to the owners of the soil adjacent,' "is the expressive language of the common law, "and is of universal application" (Ruger, *Ch. J.*, in Smith *v.* City of Rochester, 92 N. Y., 473.

The appellees concede that in navigable streams generally, and certainly in the State of New York, there is a public interest, supported by the incident of navigability. They are public ways.

The private interests in them are subordinate, and are enjoyed by the private owners, subject to the public interest and the jurisdiction of the State in respect thereto. Subject only to the Federal Government, the jurisdiction of the State is supreme, and injuries occasioned to private owners in such navigable streams by the State within its own boarders in promoting navigability are not legal injuries, but are *damnum absque injuria*, even as they are when resulting from the exercise of the Federal power.

Smith *v.* City of Rochester, 92 N. Y., 463.

Scranton *v.* Wheeler, 179 U. S., 141.

Rundle *v.* Delaware & Raritan Canal Co., 1 Wall., Jr., 275.

But such injuries to be *damnum absque injuria* must be occasioned by an act relating to navigability. No other purpose will sustain the act nor can any such other purpose be cloaked under navigability.

Smith *v.* City of Rochester, 92 N. Y., 463.

But the Byram River, as a private non-navigable stream, is subject to none of these conditions. It is private property, and its status is well set forth in the words of Chief Judge Ruger, *supra*.

Strictly speaking, it is not so much the stream that is property as it is the usufructuary right. Not the stream, but the use of the stream with volume and current as nature established it. The right to be usufructuary as to all the owners must in the nature of things involve reciprocal rights and duties between the owners. The upper riparian owners cannot divert from the lower riparian owners; the lower riparian owners cannot obstruct so as to flood the lands of the upper riparian owners. The property they all enjoy is the use of a stream in motion, in volume and current according to nature. When the upper riparian owners divert from the lower riparian owners, the property of the latter is

taken. So, conversely, the obstruction of the stream by the lower riparian owners so as to flood the upper riparian owners is a taking of the property of the latter. In each case user in common (which is of the essence of this form of property and without which there is in law no such property) is impaired or destroyed and property *pro tanto* is taken.

(*b.*) *Concerning the point that the use of the water is limited to riparian uses.*

In creating this species of property the law had regard to the use. The use was limited to riparian owners, and it was further laid down that the uses to which the riparian owners could put the stream must be riparian in their nature. If the stream was used by one who was not a riparian owner or was used by a riparian owner for purposes not riparian, that was by the law *pro tanto* a taking of property. Riparian uses, as is well known, were limited to the use of the water for the purposes of supplying the family of the owner, for the purpose of watering stock, for the purpose of irrigating his lands, provided those lands were riparian in their nature, and that such use was restricted so as not to impair the volume and flow of the stream. Lastly, the waters of a stream could be use for the purpose of water power, provided that after being so used the water was returned to the stream. It is obvious that the philosophy underlying these principles of the law was to maintain the stream with the volume and flow with which by nature it was created, and it may be said that the limitation upon the use of a stream, from the beginning of the common law to the present time, has been and is that the riparian owner may make such use of it as shall not impair its volume or its current as to other riparian owners. The authorities sustaining these principles will be found in the various cases cited in this brief.

One of the most important considerations in this case is that the City of New York in its use of the

water of this stream is not a riparian owner. If it claims to be a riparian owner its claim is as invalid as it is unreasonable. As shown in the résumé of the testimony set forth above, the purpose of the City in diverting this stream is non-riparian. It diverts the stream from a fertile valley of Connecticut to the City of New York, many miles away, in another water shed and there appropriates that water to alien and unnatural purposes. It needs no argument to demonstrate and no authority to sustain the view that such a use is essentially non-riparian, and such a claimant essentially a non-riparian owner.

A municipal corporation by purchasing or acquiring land upon a natural stream and thereby in respect to said land becoming a riparian owner, does not acquire the right to the use of the water for municipal purposes. This is true whether such municipal corporation is located upon the banks of the stream and takes the water immediately therefrom, or is situated at a distance and takes the water indirectly therefrom by means of an aqueduct or conduit. Such municipal purposes are not within the limit of ordinary use which the law attaches to riparian ownership.

City of Emporia *v.* Snowden, 25 Kansas, 588 (606).

Stern *v.* Burden, 24 Ala., 130 (146).

The City of New York in pressing its claim here to be considered as a riparian owner is in conflict with this well-established principle of law and is contending directly against the law as laid down by the Court of Appeals of its own State.

Garwood *v.* N. Y. C. R. R. Co., 83 N. Y., 400.

Smith *v.* City of Brooklyn, 160 N. Y., 357.

In the last mentioned case the City of Brooklyn purchased lands and proceeded to sink wells for the

purpose of procuring water for the municipal water supply. The wells were sunk to such depth and in such numbers as to draw off percolating subterranean waters from adjoining lands the ownership of which the City had not acquired. While the usual rule of law is that the owner of land is not liable for the diversion of percolating waters, yet the New York Court of Appeals held that this rule was applicable only to ordinary conditions of use and ownership, and did not apply to the extraordinary purpose for which the municipality had sunk the wells, and that, therefore, the municipality was liable in damages.

(c.) *Concerning the point that if a water course is diverted or obstructed, a legal wrong is done at the point where the effect of the diversion is felt or the injury sustained.*

Where a water course is diverted, a wrong in contemplation of law is committed at the point where the injury resulting from the diversion is sustained. If the act of diversion is in one county, and the lines affected thereby lie in another, a cause of action arises in the latter county. The better rule would seem to be that a cause of action arises in both counties.

1 Chitty's Pleadings, 259.
Bulwer's Case, 4 Coke,
Barden *vs.* Crocker, 10 Pick., 390.
Leveridge *vs.* Hoskins, 11 Mod., 257.
Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M., 538.

By some Courts it has been held that at common law the cause of action was limited to the county where the lands were situated which suffered the results of the nuisance established in the adjoining county.

Wooster *v.* Winnipiseogee Lake Co., 28 N. H., 525.

Thompson *v.* Crocker, 9 Pick., 598.
Sutton *v.* Clarke, 6 Taunt., 29.

But in any case there is and always has been a cause of action arising at the point where the result of the diversion was suffered or sustained no matter at what point that diversion was effected.

As between independent states or nations there would be no cause of action in the nature of things, for there would be no court of competent jurisdiction, and the controversy would be settled by diplomatic negotiations or by an appeal to arms.

Gould on Water, 3d Ed., Sec. 488.

It seems to be a principle of international law that there is a right to a user in common as between the citizens of two States in and to an unnavigable interstate steam. Grotius states the principle thus: "So " a river, as it is a river, is the property of those people " whose the banks are or his who has the sovereign " power over them in whose power it is to make " dams or mills in it, and whatsoever is bred in that " river is his; but that river as it is a flowing stream " remains common. Every man hath the right to " drink or to draw water out of it as well as he that " owns it." This principle of international or public law corresponds with peculiar exactness to the principle of the common law or of private law, that a running stream shall flow as by nature it was wont to flow. The Government of the United States has asserted itself in support of this international principle. Thus in 1880, Mr. Evarts, Secretary of State, in an official communication to the Mexican Government asserted that the acts of the Mexicans on the west shores of the Rio Grande in diverting into ditches for irrigation the waters of that river to the injury of riparian owners in Texas were " in direct " opposition to the recognized rights of riparian " owners and if persisted in must result in disaster " and wrong to our farming population on the line " of the Rio Grande and might eventually if not

" amicably adjusted through the medium of diplo-
" matic intervention, be productive of constant
" strife and breaches of the peace between the in-
" habitants of either shore."

Wharton's International Law Digest,
2nd Edn., Vol. 1, Sec. 20.

Again in 1884, Secretary Frelinghuysen asserted in communications to the United States Minister at the Court of St. James that the construction of works on the Meduxnikuk River in the Province of New Brunswick, whereby the flow of that stream in the State of Maine was obstructed to the injury of the lumbering districts in Maine, was a proper subject for diplomatic interposition by the Government of the United States.

The question in this controversy, however, arises not between two independent nations, but between two States of the Union, or rather between citizens of two States. It may well be that the state courts of New York could decline to take jurisdiction of an action or of a suit brought by a landowner in Connecticut under the circumstances of this case, and similarly a court of Connecticut could refuse jurisdiction of a similar suit or action brought by a land owner of the State of New York. In the absence of legislative provisions in those States making it mandatory on their courts to take jurisdiction of such cases the courts of those states might hold that in each case the wrong done resulted in a local as distinguished from a transitory cause of action.

Watts *v.* Kinney, 23 Wend., 484.

The refusal of the courts of the States to entertain such controversies would not, however, in any case determine that a cause of action did not exist. It would simply develop a situation where owing to a defect in the judicial system—the lack of a court of competent jurisdiction—no method existed within the State Courts for redressing the wrong done. But Connecticut and New York are not independent na-

tions. They are not sovereignties in the full sense of that word. There is a paramount sovereignty of the United States in respect to things Federal. By that paramount sovereignty the citizens of the two States are guaranteed their property as created and vested in them by their respective States, and a system of Federal courts is established to protect the guarantee.

Angell on Water Courses, 7 Edn., Secs. 420, 421.
Rutz *v.* City of St. Louis, 7 Fed. Rep., 438.
Holyoke *v.* Connecticut River Co., 22 Blatch. (U. S.), 131.
Foote *v.* Edwards, 3 Blatch., 310.
Slack *v.* Walcott, 3 Mason, 517 (Judge Story).
Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M., 538.
Thayer *v.* Brooks, 17 Ohio, 489.

In Watts *v.* Kinney, 23 Wend., 484, the nuisance was erected in the State of New ~~York~~ Jersey. Damage resulted to lands on a water course in New Jersey. Action on the case for damages was brought in New York in a State court. The Court refused to take jurisdiction of the case sustaining the view that the cause of action was relegated to the jurisdiction of the State of New Jersey, the lands damaged lying in that State. This last mentioned case seems to be regarded by the counsel for the City with some degree of favor. So far from sustaining their contention it rather sustains the contention of the appellees. The Court in which the action was brought was not a Federal court, but a State court. The law of New York at that time regarded an action on the case for damages resulting from a nuisance or trespass as local in its nature, and, therefore, relegated the suit to the courts of New Jersey. Obviously, the case has no application to a suit in a Federal court for an injunction restraining a nuisance.

Vide the authorities cited above.

It is clear, then, that by the law of the land (and alike by the law of Connecticut and New York), when the City diverted this stream in New York it committed a legal injury in Connecticut, and a right of action at once accrued to the appellees, unless, as to the act of diversion of which they complain, the Statutes of Eminent Domain of the State of New York under which the City justifies were due process of law.

This brings us to the application of the law of riparian property to an interstate stream under our political system and in view of the union of the States.

The Riparian Law and the Interstate Stream.

The riparian law of Connecticut and of New York is derived from the Common Law (N. Y. Const., Art 1, Sec. 16; Smith *v.* City of Rochester, 92 N. Y., 480; Conn. Const., Art. X., Sec. 3; Baldwin *v.* Walker, 21 Conn., 180), and the Jurisprudence of the two States is the same in respect to riparian rights and remedies. The cases from the courts of the two States cited in this brief will fully sustain this assertion. We may, therefore, dismiss from the argument all speculations as to what would be the rights and remedies here if the law of the two States presented points of difference. Where such a difference exists counsel for the appellees concede that questions of some perplexity may arise, but void as is the case at bar of such points of difference, the question submitted is solely one of the common law of riparian property considered in relation to an interstate stream.

Connecticut by an unbroken line of decisions has confirmed her landowners in their common law riparian rights. New York has done the same. More than this New York has by its highest tribunal repudiated the claim made here by its municipality. Its Court of Appeals, referring to the private water course, declared in Smith *v.* City of Rochester, 92

N. Y., 480, "NEITHER SOVEREIGN NOR SUBJECT CAN HAVE ANY GREATER THAN A USUFRUCTUARY RIGHT THEREIN."

The riparian owners of the two States from the earliest days have enjoyed their property in the water courses of the two States with the reciprocal rights and duties which the riparian law establishes. These conditions have applied as well to interstate streams, as well to the Byram River, as to water courses wholly within either State. Neither State has questioned the rule that riparian owners in their private rights could not interfere with each other even though a State boundary divided their ownership. That rule is not questioned in this case. The City's claim is based solely on its *public* status as a municipal corporation and upon its *statutes of eminent domain.* No one asserts but that if a New York ripariarn owner in private right diverted the water of this very Byram River from a Connecticut owner the latter could enjoin him. It is, therefore, clear that the two States have established their citizens in ownership along this water course with all the common law incidents of riparian ownership. On each side of the State line the usufructuary right of these owners depends on the maintenance of the natural flow of the stream regardless of the State boundary line.

Slack *v.* Walcott, 3 Mason, 517 (Judge Story).

Now, what is the argument of the appellants? It is, that conceding the nature of riparian rights and property in Connecticut and New York, as stated above, a municipal corporation of New York, under the authority of that State by its statute of eminent domain may divert in the State of New York the water course in question and so deprive the riparian owners in Connecticut of the stream, and that there is no remedy save damages.

If this be true, then it must follow that a municipal corporation under a statute of eminent domain

in Connecticut can dam this stream in Connecticut, flood the territory of New York and continue in the perpetration of the wrong—the landowners in New York being dismissed from the Federal courts without relief or with an award of damages, injunctive relief refused them, their property taken from them and the aggressor confirmed in his title.

To such monstrous conclusions does the argument of the appellants surely lead.

II.

By the taking of the river these respondents are deprived of property.

The right of a riparian owner to have the stream run as by nature it is wont to run is not a mere right or easement. In Connecticut and in New York, as by the common law, it is "property *per se*," "part of the freehold," "of the substance of the inheritance," "parcel of the land itself," "property within the meaning of the constitutional guaranty."

Parker *v.* Griswold, 17 Conn., 299.
Wadsworth *v.* Tillotson, 15 Conn., 365 (p. 372).
Harding *v.* Stamford Water Co., 41 Conn., 87 (p. 92).
Platt Bros. & Co. *v.* Waterbury, 72 Conn., 531 (p. 552).
Gardner *v.* Village of Newburgh: 2 Johns. Chan. 161
Scriver *v.* Smith, 100 N. Y., 471.
Gallagher *v.* Kingston Water Co., 25 N. Y. App. Div., 82 (p. 85).
Smith *v.* The City of Rochester, 92 N. Y., 463.
Strobel *v.* Kerr Salt Co., 164 N. Y., 303 (p. 320).

Woolrych Law of Waters, 146 (78 Law Library), 153.
Gould on Waters (3d Ed.), Sec. 204.
Black's Pomeroy on Water Rights, Sec. 9.
Angell on Water Courses (7th Ed.), Sec. 8, Sec. 90.
Washburn on Real Estate (5th Ed.) Vol. II., p. 366.
Slack *v.* Walcott, 3 Mason, 517 (Opinion by Judge Story).
Johnson *v.* Jordan, 2 Metc., 234 (Opinion by Chief Justice Shaw).

"It may be laid down as a well settled principle "that every proprietor over a part of whose land a "stream of water flows has a right that it shall "continue to flow to and from his premises in the "quantity, quality and manner in which it is ac- "customed to flow by nature, subject to the right "of the upper proprietors to make a reasonable use "of the stream as it flows past their land. *This* "*right is a part of his property in the land and in* "*many cases constitutes its most valuable element.* "*It necessarily follows, therefore, that any violation* "*of this right in the exercise of the power of emi-* "*nent domain is a taking of private property for* "*which compensation must be made.*"

Lewis on Eminent Domain, 2d Ed., Sec. 61.

The Supreme Court of the United States in Pumpelly *v.* Green Bay Company, 13 Wall., 1, have held that the backing of water by a dam in a stream so as to raise the level of a lake and thereby flood the lands of a riparian owner, though done, under statutes authorizing it, for the public benefit, is a taking of property within the meaning of the constitutional guaranty. "This proposition," said the Court, "is not in conflict with the weight of judi- "cial authority in this country and certainly not

" with sound principle." This decision reversed the judgment of the Supreme Court of Wisconsin holding that the flowing was not a " taking " of property and that, therefore, the damages were consequential.

The diversion of a stream is none the less a taking of property than is the damming back of a stream and the consequent flooding of riparian lands. The validity of both propositions depends upon the fundamental principle of riparian law that the right to have a water course flow according to nature is property *per se*.

III.

The deprivation is without due process of law.

The right of the appellees to have the waters of the Byram River flow over their lands in Connecticut as by nature they were wont to flow is property as we have shown. As these lands lie in the State of Connecticut this right is real property in the State of Connecticut. When taken, as in this case, under the statutes of another state it is taken without due process of law.

Right here is the main issue between the parties to this controversy. Is the injury of which the appellees complain the result of the wrongful taking of their property, of a direct invasion thereof, or is it but the incidental consequence of the lawful and proper exercise of a governmental power of the State of New York. The appellees assert that it is a wrongful act, a taking of their property and a direct invasion of their rights, and hence that there is a cause of action. The appellants assert that it is the result of a lawful act, a consequential and not a direct injury.

It is certainly true that if the injury to the appel-

lees is the result of a lawful act, a consequential and not a direct injury, there could and would be no cause of action. It would be *damnum absque injuria*. Unfortunately alike for the logic and validity of the appellant's claim they concede that there is a cause of action, insisting only that it is limited to the recovery of damages. The position of the appellants on this point is one of irreconcilable contradiction. There may be a lawful act and no damage, because there is no legal injury and hence no cause of action, but there cannot be, as the city asserts, a lawful act with a resulting cause of action and damage. The concession of the city that there is in the appellees a valid claim for damages enforcible at law is, therefore, a concession of the main contention of the appellees in this controversy, to wit, that they have sustained a legal injury, and that they have a valid cause of action. If this be true it remains only to consider what is their remedy and are they limited to pecuniary damages.

There can be no surer test applied to determine whether there is due process of law in this case than by answering the question—Is there a cause of action created in the appellees? For an act done in one state under a statute of eminent domain which produces actionable damage in another state is not done by due process of law. And if there is a cause of action in the appellees then is there no due process of law? It is fundamental in the law that statutes of eminent domain have no extra territorial effect. "It follows," says Mr. Lewis, in his work on Eminent Domain, "that one State cannot authorize the "condemnation of land in another State, also *that* "*it cannot authorize works which will produce* "*actionable damage in another State.*"

Lastly, it is to be remembered that the power of eminent domain takes private property for public uses. To public uses it is limited as exercised by the governments of all civilized countries, and as vested in the States of New York and Connecticut under their respective constitutions. Nothing is more ob-

vious than that public uses in the State of New York are not public uses as to lands lying in Connecticut. and such uses do not sustain a statute of eminent domain as to such lands within the constitutional limitation.

Rights which Connecticut has declared to be property, and impressed with the nature of realty and inseparably attached as part and parcel of the freeholds of her citizens are not and in the nature of things cannot be subject to the power of eminent domain of the State of New York, and cannot be taken against the will of the owner for public uses in New York.

It matters not that the means whereby the property is taken—the city's dam—is located in New York, nor that the act of diversion is committed there. By the laws of Connecticut and New York property in this water course is so ordained and established that notwithstanding the act of the city is performed in New York, the taking is perpetrated in Connecticut beyond the jurisdiction of the statutes of New York, and, therefore, without due process of law (see Slack *v.* Wolcott, 3 Mason, 517, Judge Story).

IV.

The Federal courts have jurisdiction in controversies of this kind.

By the Constitution of the United States it is declared that the judicial power of the United States shall extend to controversies between citizens of different States and to all cases in law and equity arising under the Federal Constitution. In the case at bar the controversy is between citizens of different States, and it arises under the Constitution of the United States. Viewed as a case of the taking of property without due process of law the jurisdic-

tion of the Federal courts is obvious. We need only consider the Federal jurisdiction of the case as a case of nuisance.

It is conceded by the appellees that where a trespass is committed on lands (*trespass quare clausam fregit*) lying in one circuit an action for trespass cannot be brought in another circuit where the wrongdoer is found and resides. The rule laid down to this effect in Livingston *v.* Jefferson, 4 Hughes, 606, has never been departed from. It received in that case an extended consideration from Chief Justice Marshall who expressed his own dissatisfaction with the rule and conceded that under our Federal system it left a legal injury without redress so long as the wrongdoer remained beyond the jurisdiction of the State courts where the lands lay, but the conclusion of the learned Chief Justice was that the entire preponderance of judicial opinion was in favor of the rule, and that he could not venture to disturb it. It is to be observed, however, that this rule is strictly limited in the case just cited to the case of *trespass quare clausam fregit*. There is an obvious and essential difference between trespass on lands and nuisance. In the one the act and the result are local and all the elements uniting to create the cause of action occur at one point and necessarily within one jurisdiction. In nuisance, however, this is not the case. The nature of this tort is such that frequently the act and the result of the act are widely separated. They may be in different counties and in different jurisdictions. Hence, the rule that where a nuisance is created in one county or jurisdiction resulting in injury to lands in another county or jurisdiction there is a cause of action in both counties or jurisdictions (see p. 20 of this Brief).

It is obvious, therefore, from the essential nature of nuisances that the Federal courts should take jurisdiction of nuisance cases arising between the citizens of different States. Such jurisdiction in them is essential to the peace and integrity of the Union. The authorities on this point are unani-

mous. Action for *trespass quare clausem fregit* in the circuit courts of the United States may be local and limited to the circuit wherein the trespass was committed, but actions for nuisances and suits to restrain nuisances are not local and where the act of nuisance is in one circuit and the resulting injury is in another circuit, the action or suit may be brought in either circuit. It is obvious that it will usually be brought in the circuit wherein the nuisance has been established, and necessarily so if that be the residence of the wrongdoer.

After an extended examination of the authorities touching the jurisdiction of the Federal courts in controversies of this character, the appellees' counsel believe that they are substantially unanimous.

Rundel *v.* Delaware & Raritan Canal Co., 1 Wall. Jr., 275; 14 How. U.S. 80

Foote *v.* Edwards, 3 Blatch., 310.

Holyoke Water Co. *v.* Connecticut River Co., 22 Blatch., 131.

Rutz *v.* City of St. Louis, 7 Fed. Rep., 438.

Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M., 538.

Slack *v.* Wolcott, 3 Mason, 517.

V.

The remedy is by injunction.

A wrong has been done. The property of these respondents has been unlawfully appropriated and is unlawfully withheld from them by the appellant. It is in a condition to be itself restored to them. To its actual restoration they have an absolute right. They refuse to submit themselves to the statutes of

New York. They refuse to take the compensation therein provided or to invoke the protection of the tribunal created by the statute. Equally they refuse to accept damages. There is no power which can compel them. Asserting their absolute rights under the Federal Constitution and the Constitution of the State of Connecticut, they demand that their property be restored to them. It is elementary in the law that when property is wrongfully taken and withheld and is in a condition to be itself restored, the wrongdoer must return the property, and cannot, save at the election of the owner, retain the property and escape with an award of damages. To sustain and effectuate this vital principle there has been built up at law and in equity that vast framework of legal and equitable remedies on which property depends, comprising detinue, replevin, ejectment, specific performance and injunction.

If, then, there is an absolute right in these respondents to have this property returned, there must be a remedy to secure that right. It is axiomatic in the law that where there is a right there is a remedy.

What is that remedy?

By the law of Connecticut, by the law of New York and by the law as declared and administered in the Courts of the United States, it is the injunction.

Legg *v.* Horn, 45 Conn., 409.
Enfield *v.* Conn. River Co., 7 Conn., 28 (p. 50).
Parker *vs.* Griswold, 17 Conn., 287.
Water Commissioners *v.* Perry, 69 Conn., 468.
Mason *v.* Hoyle, 56 Conn., 255.
Garwood *v.* N. Y. C. R. R., 83 N. Y., 400.
Gilzinger *v.* Saugerties Water Co., 66 Hun, 173 (affd. 142 N. Y., 633).

Corning *v.* Troy Iron Foundry, 40 N. Y., 204.
Amsterdam Knitting Co. *v.* Dean, 162 N. Y., 278.
Strobel *v.* Kerr Salt Co., 164 N. Y., 303.
Holyoke Water Power Co. *vs.* Conn. River Co., 22 Blatchford, 131 (opinion by Judge Shipman).
Webb *vs.* Portland Co., 3 Sumner, 189 (opinion by Judge Story).
Randolph's Law of Eminent Domain, Sec. 28, p. 27.

(*a.*) *The remedy is by injunction, because in the nature of things that is the only remedy whereby a diverted water course can be restored to the rightful owner.*

The right to have a running stream flow as by nature it was wont to flow being property in the nature of realty was not under the protection of the remedies of law devised for restoring personal property to an owner deprived thereof by the wrongful act of another, to wit, detinue, replevin, &c. As it was usufructuary in its nature and in itself not susceptible of possession or seisin, ejectment could not be invoked.

The wrong was regarded as a nuisance or a continuing trespass and fell under the remedies applicable to nuisances and trespass and was redressed:

By personal abatement.

By the writs of *quod permittat prosternere*, of *praecipe quod reddat* and of assize of nuisance.

By trespass, nuisance and action on the case.

In virtue of the right of personal abatement the person whose lands were injured by the diversion of a water course could enter upon the premises of another so diverting it and remove the obstruction. This right was subject to the limitation that the

entry and removal must be accomplished without a breach of the peace.

Gould on Waters, 3rd Edn., Sec. 363.
Angell on Water Courses, 7th Edn., Sec. 389.

The writs of *quod permittat prosternere*, of *praecipe quod reddat*, and assize of nuisance accomplished, for the time being, the physical removal of the obstruction and the restoration of the stream to its natural channel. It will be observed that their effect was analogous to that of the injunction in equity.

Gould on Waters, 3rd Edn., Sec. 368.
Angell on Water Courses, 7th Edn., Sec. 394.

The actions of trespass, of nuisance and on the case were directed solely to the recovery of damages.

Gould on Waters, 3rd Edn., Secs. 369, 375.
Angell on Water Courses, 7th Edn., Sec. 395.

The writs, by which at common law the actual removal of the obstruction was accomplished, have long since become obsolete, and in most jurisdictions are abolished by statute.

New York retained them under the form of the writ of nuisance. This was excepted from the general abolition of writs by theRevised Statutes. 2d Rev. Stats., p. 332, Part III., Ch. V., Title IV., Secs. 1-7.

Kintz *v.* McNeal, 1 Den., 436.
McFarlan *v.* Townsend, 17 Wend., 440.

By Section 454 of the New York Code of Procedure and Section 1660 of the New York Code of Civil Procedure the writ of nuisance was formally abolished and an action in the usual form for the abatement of a nuisance substituted.

In the State of Connecticut the injunction would seem to be substantially the only remedy whereby the diverted water course may be restored to the owner. It is apparently the only remedy in that State for the physical abatement of a nuisance. The Practice Act of Connecticut (Public Acts of 1879, p. 432, approved March 28, 1879, Section 33), gave to the judges of the Superior Court power to give effect to the act by prescribing suitable forms of procedure. In the forms of procedure adopted by the judges will be found the forms of complaint prescribed in cases of diverted water courses. They are limited exclusively to complaints for injunction.

Conn. Prac. Act 1879 (published by authority, p. 185 *et seq.*).

It is the conclusion of Mr. Wood that no power now exists in any *court of law* except by statute to direct the physical abatement of a nuisance.

" Except," he says, " in those States where special " provision is made therefor by statute, no power " exists in a court of law in an ordinary action " upon the case for damages to direct the abatement " of a nuisance after a verdict establishing it. The " old common law remedies involving an abate- " ment, have become obsolete and passed into " disuse."

Wood on Nuisance, 3rd Edn., Sec. 843.

The common law writs like the modern statutory action for the abatement of a nuisance were always inadequate and inefficient for the restoration to the owner of the diverted water course, in that while they secured the removal of the particular obstruction for the time being they could not prevent its re-establishment. If the wrongdoer persisted and renewed the obstruction a second action was necessary and a multiplicity of actions was speedily engendered. No judgment at law could operate *in*

futuro to restrain the wrongdoer from a repetition of his wrong. This could be accomplished only by a decree in equity acting *in personam* through the injunction.

The injunction in equity, therefore, from the beginning was and is now the only adequate remedy for the restoration to the owner of that peculiar species of property,—the right to a water course when unlawfully taken. As equity jurisprudence developed, the injunction came more and more into practical use in cases of diverted streams, and the ancient writs of common law passed more and more into obsolescence until in our own day it may be affirmed that the injunction is the universal remedy whereby a diverted water course may be restored to and effectually secured in the owner.

We quote again from Mr. Wood (Sec. 843). Referring to the modern statutory remedies of abatement, he says:

"It is proper to say, however, that courts hesitate "to apply these statutory remedies and do not gen- "erally encourage them; and parties in a proper "case will find far more easy redress for their "grievance from nuisances in a court of equity "than in a court of law. Courts of law will always "exercise their discretion in these matters and so "far as my researches have extended in that direc- "tion, I have found that it is only in extreme cases "even when the defendant has been convicted under "an indictment therefor that they will order the "prostration or removal of a nuisance. *They pre-* "*fer to leave the parties to their redress before a* "*tribunal of larger powers and more effective reme-* "*dies where all the rights and equities of the par-* "*ties can be fully investigated. And this course is* "*not one of doubtful wisdom and has rapidly* "*grown in favor within the last half century.*"

The application of the injunction to the restoration of riparian property to its owner is simply an

instance of the rise of equity principles and remedies to a position of supremacy over those of the common law —a development to which Mr. Pomeroy in his work on code remedies has given clear expression.

"The modes and the motives of equity gradually "penetrated the common law tribunals; equitable "principles were invoked in the decision of legal "actions; the common law has become scarcely "distinguishable in the underlying juridical forces "which govern its movements from the mass of "doctrines which taken together are called equity "jurisprudence."

Pomeroy on Code Remedies, 3 Edn., Sec. 23.

The proposition here considered is directly connected with the principle of law that the taking of private property and rights in violation of the constitutional guaranty against taking property for public purposes without due compensation may always be enjoined in equity. Both rest in a measure upon the same foundation, to wit, that the violation of the constitutional guaranties is considered a wrong of such gross nature as not to be capable of legal satisfaction and adjustment.

Spelling on Injunction, 2d Edn., Vol. 1, Secs. 273, 305.

(*b.*) *The remedy is by injunction, because damages would be inadequate.*

It is necessary to distinguish between compensation and damages. Properly speaking, a statute of eminent domain provides for compensation not for damages, for it is compensation as distinguished from damages that the Constitution declares shall be made for property taken for public purposes. Were the lands of the respondents in New York they would be subject to the statutes of eminent

domain on which the city relies. These respondents would be compelled to accept the compensation provided for in these statutes, but as the lands are in Connecticut, the respondents are under no such obligation. They may, of course, if so disposed, voluntarily confirm the taking and accept the compensation provided by the statutes. If they did so, it would not be a transaction under the law of eminent domain of the State of New York deriving its sanction from the sovereign power of that State. It would be a transaction by way of contract—a voluntary sale by the appellees to the city. It is further conceded that entirely apart from the statutes of New York, the respondents could, if they were so disposed, voluntarily confirm the taking and then sue for damages, the amount of damage being the value of the property taken, and such damage, it may be assumed, would be awarded by any Court having jurisdiction over the parties. But the appellees have an inalienable right to the return to them of the property itself. That right is guaranteed to them by the Federal Constitution and by the Constitution and Laws of the State of Connecticut, and this suit is brought to enforce that right and for no other purpose.

If the relief by way of injunction sought in this suit could be denied the respondents it is obvious that they could treat the act of the city as a continuing trespass or nuisance and bring an action on the case for damages. In such an action, it is to be observed, the damages sought are not damages for the taking of property and are not measured by the value of the property, they are damages for the act of trespass or for the nuisance. The damage recovered in such a case would be only the damage sustained by the complainants up to the time of the commencement of the action or in some cases up to the time of judgment (Uline *v.* N. Y. C. R. R., 101 N. Y., 98; Stovers *v.* Gilbert, 156 N. Y., 600). The act of wrongdoing being continuous in its nature or constantly recurring or repeated from day to day,

the complainants could sue from time to time in action on the case for damages and thus a multiplicity of suits would be engendered. This of itself would give rise to the jurisdiction of equity and may be regarded as one of the fundamental bases of that jurisdiction in suits for injunction in cases of diverted water courses.

It is expressly held in Connecticut that in such an action on the case for a continuing trespass or nuisance, the party aggrieved can sue from time to time until by a multiplicity of suits they establish equitable jurisdiction. In each one of such suits, provided that an actual trespass or wrong were proven, the plaintiff could have his judgment for costs and, it may be, a verdict for nominal damages, even though he proved no pecuniary damage.

Water Commrs. *vs.* Perry, 69 Conn., 468.

The undoubted doctrine of the New York cases that the diversion of a water course imports damage and that no pecuniary damage need be proven to sustain a judgment (see this brief, p. 42) is to the same effect.

The New York Court of Appeals said in Stowers *vs.* Gilbert, 156 N. Y., 604, that "in a case like the "one at bar, where the defendant has no power to "condemn the property he has entered upon, two "remedies are open to the plaintiff,—an action at "law for damages, and a suit in equity for an in- "junction and damages. *In the action at law only* "*such temporary damages are recoverable as have* "*been sustained up to the time of the commence-* "*ment of the action, and the plaintiff may bring* "*successive actions until the defendant abates the* "*nuisance.* In the suit in equity, which is the "remedy invoked in this case, the plaintiff recovers "only his damages up to the entry of the judgment "and at the same time secures an injunction which "prevents the future trespass."

(c.) *There is no other relief in equity save the injunction. Our courts of equity have no power to withhold an injunction and to decree in lieu thereof the payment of a sum of money in the way of damages or compensation.*

It is true that in England by the Act of Parliament known as Lord Cairn's act, 21 and 22 Victoria, Chap. 27, the power was given to the Chancery Courts to award damages in lieu of the injunction in certain cases, as follows:

"II.—In all cases in which the Court of Chancery "has jurisdiction to entertain an application for an "injunction against a breach of any covenant, con- "tract or agreement or against the commission or "continuance of any wrongful act or for the specific "performance of any covenant, contract or agree- "ment it shall be lawful for the same court if it "shall think fit, to award damages to the party in- "jured either in addition to or in substitution for "such injunction or specific performance and such "damages may be assessed in such manner as the "court shall direct."

The act has resulted in some suggestive expressions of opinion from Judges of the English Courts, Judge Kerr holding that a grave necessity now arises for the exercise of a judicial discretion "in such a way "as to prevent a man doing a wrongful act and "thinking that he could pay damages for it"; and Sir James Jessel, Master of the Rolls, in Krehl *v.* Burrill, 7 Chan. Div., 554, asserting that it was never meant by the act to enable the rich man to wrong the poor man and escape with an award of damages.

But no power to grant damages in lieu of the injunction has been conferred on the Federal or State courts in this country.

(*d.*) *The so-called injunction in the alternative cannot be applied in the case at bar.*

The injunction in the alternative is limited to cases where the act complained of is committed under due authority of law. It has been granted in cases where, acting under a statute of eminent domain, property or rights have been taken without making the compensation directed in the statute. In these cases the taking being legal the courts have granted the injunction to take effect at a given time, unless at that time compensation had been paid. Where it appears in an equity suit that the defendant has no legal right to take the property, the plaintiff can not be put off with the injunction in the alternative, the injunction absolute must issue. This has been expressly held in the courts of New York, where the injunction in the alternative was largely used in the Elevated Railroad cases. In those cases there was, of course, due process of law, because there was a competent statute of eminent domain.

Pappenheim *vs.* Elevated R. R., 128 N. Y., 436.

Stowers *vs.* Gilbert, 156 N. Y., 600.

(*e.*) *The right to the remedy of injunction is not dependent on the extent of appellees' injury or the amount of their damage, nor upon any hardship resulting to the appellants from the operation of the injunction.*

The real and substantial pecuniary damages of the respondents are admitted and proven (see pp. 3, 13 of this brief). Even if there were no pecuniary damage it would not avail the appellant. It is fundamental in the law of New York and in the law of Connecticut that the diversion of a water course of itself imports damage, and the riparian owner may have his injunction irrespective of the extent of his pecuniary loss.

New York Cases:

In Corning *vs.* Troy Iron Foundry (40 N. Y., p. 204), the Court of Appeals said, by Judge Grover: "It follows that the plaintiffs had the "right to have the stream flow in its natural chan- "nel along the seven acres purchased by them; for "a violation of this right by the defendant they had "a right of recovery without proof of actual "damage, irrespective of any use of the water power "by them." And again, at page 205, the Court said, "The question then comes to this: "Whether the defendant who has wrongfully "diverted from the plaintiffs a stream affording "such a water power shall be permitted to con- "tinue such wrongful diversion and thus to deprive "the plaintiffs of what is clearly theirs without their "assent upon the ground simply that its restora- "tion would be a great damage to it. In other "words that by its continuing wrongfully to appro- "priate to its own use the property of the plaintiffs "it derives a much greater benefit than the plain- "tiffs could, by being restored to their own. The "bare statement of the question would seem to "suggest the only proper answer. The very idea "of justice is to give to each one his due. The use "of the natural flow of the stream is the due of the "plaintiffs and to justify withholding it from them "requires some better reason than loss to the wrong- "doer consequent upon its restoration."

The same Court, by Judge O'Brien, in Amsterdam Knitting Company *vs.* Dean, 162 N. Y., p. 280, said: "Where the lands of the party com- "plaining of such a diversion of running water "includes either the whole or a part of the natural "channel, equity will enjoin the continuance of the "unlawful act of the owner above and interfere by "mandatory injunction to restore the stream to its "original condition. The circumstance that the "plaintiff in such a case has shown no actual

" damage is not necessary to the application to have " the water restored to its natural course."

And in Strobel *vs.* Kerr Salt Co., 164 N. Y., p. 323, the same Court said: "Even if the damages are " slight, where the act complained of is such that " by its repetition or continuance it may become " the foundation or evidence of an adverse right, a " court of equity will interpose by injunction."

See also N. Y. Rubber Co. *v.* Rothery, 132 N. Y., 293.

Connecticut Cases:

The Supreme Court of Connecticut, by Mr. Justice Storrs, said in Parker *vs.* Griswold, 17 Conn., 302, " Whatever doubt may have been entertained " formerly upon this subject is now settled by " the uniform course of decisions both in Eng- " land and in this country that where one has a " right to the use of a stream naturally flowing " through his land, capable of being used for a bene- " ficial purpose, and it is diverted therefrom by " another, it is not necessary for the person having " such right in an action for such diversion to prove " that he has actually applied the water running " through his land for any beneficial purpose, or, in " other words, that he has sustained any specific dam- " age by such diversion interfering with his applica- " tion of the water; but that he has a right to re- " cover, notwithstanding that he has sustained no " perceptible or actual damage by such diversion. " And we think that these decisions rest on the most " satisfactory reasons."

See also

Branch *vs.* Doane, 18 Conn., 233 (p. 242).

Water Commrs. *vs.* Perry, 69 Conn., 461 (p. 468).

English Chancery Cases:

Wilts. & Berks. Canal Nav. Co. *vs.* Swindon Water Works Co., L. R., 9 Ch., 451.

Beckett *vs.* Morris (Lord Westbury) L. R. Scotch & Divorce H. of L., Vol. 1, p. 47 (1866, 1869).

Federal Cases:

In the Circuit Court of the United States in the case of Webb *vs.* Portland Co., 3 Sumner, 189, Judge Story said:

"But if the doctrine were otherwise and no action "were maintainable at law without proof of actual "damage, that would furnish no ground why a "court of equity should not interfere and protect "such a right from violation and invasion; for in a "great variety of cases the very ground of the "jurisdiction of a court of equity is that the injury "done is irremediable at law, and that the right "can only be permanently preserved or perpetuated "by the powers of a court of equity, and one of the "most ordinary processes to accomplish this end is "by a suit of injunction, the nature and efficacy of "which for such purpose I need not state as the "elementary treatises fully express them. If then "the diversion of water complained of in the "present case is a violation of the right of the plaintiffs and may permanently injure that right and "become by lapse of time the foundation of an adverse right in the defendant I know no more fit "case for the interposition of a court of equity, by "way of injunction, to restrain the defendants from "such an injurious act. If there be a remedy for "the plaintiffs at law for damages still that remedy "is inadequate to prevent and redress the mischief. "If there be no such remedy at law then *a fortiori*, "a court of equity ought to give its aid to vindicate "and perpetuate the right of the plaintiffs."

(f.) Section 723 United States Revised Statutes does not militate against the right of these respondents to their injunction. On the other hand, its effect is to sustain their right.

Section 723 provides as follows: "Suits in equity "shall not be sustained in either of the courts of the "United States in any case where a plain, adequate "and complete remedy may be had at law."

It has been repeatedly held by this Court that this provision is merely declaratory of the law as it has always existed from the beginning of Equity.

Boyce's Executors *vs.* Grundy, 3 Pet., 210, 215.

Also, "that the remedy at law in order to exclude "a concurrent remedy at equity must be as com- "plete, as practical and as efficient, to the ends of "justice and its prompt administration as the "remedy in equity."

Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 12.

But, the substance of the appellees' contention is that in the case at bar there is no plain, adequate and complete remedy at law whereby this property, wrongfully taken and wrongfully withheld, can be restored to the rightful owners. The equitable remedy of injunction alone can redress the wrong.

Moreover, the Federal courts have construed this provision to the effect that where a statute of a State creates a new right or provides a new remedy the Federal courts will enforce that right, either upon the common law or equity side of its docket, as the nature of the new right or remedy requires, saving only that the provision of the Federal Constitution preserving jury trials in *common law* cases must not be infringed.

Cummings *vs.* Bank, 101 U. S., p. 153.
Van Norden *vs.* Morton, 99 U. S., 379.
Grether *vs.* Wright, 75 Fed. Rep., 742.

The United States Supreme Court said in Smyth *v.* Ames, 169 U. S., p. 516: "It is true that an enlargement of equitable rights arising from the "statutes of the State may be administered by the "Circuit Court of the United States. * * * A "party by going into a National court does not, "this Court has said, lose any right or appropriate "remedy of which he might have availed himself "in the State courts of the same locality; the wise "policy of the Constitution gives him a choice of "tribunals. * * * A State cannot tie up a citizen of another State having property rights "within its territory invaded by unauthorized acts "of its own officers, to suits for redress in its own "courts."

The right in Connecticut and in New York to the injunction in such a case as the case at bar has been demonstrated to be clear. To that same equitable remedy the appellees are entitled when by reason of diverse citizenship or a question of constitutional law they have come into the Federal Courts. This view is further enforced by the consideration that the question arising here is a question arising under the law of real property. The real property involved is located in the State of Connecticut. In cases involving real property and rights therein, the Federal Courts regard and apply the law of the State within which such real property lies.

Jackson *vs.* Chew, 12 Wheaton, 153.
Burgess *vs.* Seligman, 107 U. S., p. 20.

The City of New York, a municipal corporation of the State of New York, defending this case in a Federal Court, sets up under Section 723 the claim that the Federal Court has no right to administer, upon the prayer of the bill, the very relief and to afford the very remedy which the law of the State of New York declares to be the relief and the remedy

in like cases. The validity of the City's claim is denied by the authorities.

Grether *v.* Wright, 75 Fed. Rep., 742.

Again it may be said that, the City of New York having taken, under a statute of the State of New York, property in the nature of realty located in Connecticut, asserts that the relief and the remedy provided for the wrong, both by the law of Connecticut and by the law of New York, cannot be obtained in the Federal Courts because of Section 723. It is submitted that such a contention is without validity in law and without support in reason.

Lastly, the jurisdiction in equity of the Federal courts is (subject to the limitations of the Federal Constitution) substantially the same as that of the English Court of Chancery.

The remedy of injunction in cases of diverted water courses has always been recognized in the English Chancery Courts, and has been a remedy of frequent application. It is embraced within a field where equity has always had unquestioned jurisdiction—that of enjoining nuisances.

The Attorney General *v.* Council of Birmingham, 4 K. & J., 528

Stokes *vs.* Banbury Board of Health, L. R., 1 Eq. 42.

Lane *v.* Newdgate (Lord Eldon), 10 Vesy, J., 192.

Bush *v.* Western (1720).

Rockdale Canal Co. *v.* King, 2 Sumner's Rep., N. S., 78.

Robinson *v.* Lord Byron (1785), 1 Brown's Ch. Reps., 588 (Lord Thurlow).

Elwell *vs.* Crowther, 31 Beav, 163.

Chalk *v.* Wyatt, 3 Merivale, 688 (Lord Eldon).

Grand Junction Canal Co. *v.* Slingar, L. R. 6, Chan. App., 488.

Attorney General *vs.* Great Eastern Rly Co., L. R. 6, Ch. 572.

Clowes *v.* Staffordshire Waterworks Co., L. R. 8, Chan. 125.
Wilts. and Berks. Canal Navigation Co. *v.* Swindon Water Works Co., L. R. 9 Ch. 451.

(*g.*) *The claim of the appellant that equity can not grant the injunction until the appellees establish their rights at law by a jury trial is error. There are no rights to establish. The essential facts are admitted.*

It is true that equity has sometimes refused the injunction until a trial at law was had, but this has been done only in cases where the facts were disputed and the legal rights of the parties being in doubt it was necessary to establish them at law before the right to the injunction could be determined.

New York Cases:

"This Court," it was held by Chancellor Kent, "may issue an injunction to prevent the obstruction "of an ancient water course though the plaintiff "has not established his title at law."

Gardner *v.* Village of Newburgh, 2 Johns. Chan., 164.
See also Corning *v.* Troy Iron Foundry Co., 40 N. Y., 191.

Connecticut Cases:

The Supreme Court of Connecticut in Roath *vs.* Driscoll, 20 Conn., 538, said: "This is an application "to a court of equity to prevent the defendant "from using a certain reservoir of water situate "upon his premises. The Court doubtless possesses "the necessary power, but it is not to be exercised as "a matter of course, even when the plaintiff suffers "some injury to his real estate. *Whenever the right* "*is doubtful or needs the investigation of a jury*

" *upon facts in dispute* a court of equity is always " reluctant to interpose its summary authority, " for it is rather the duty of the Court to protect " acknowledged rights than to establish new and " doubtful ones."

See also, Walcott *v.* Robbins, 26 Conn., 236.

English Chancery Cases:

Finch *v.* Resbridge, 2 Vernon, 390.

Bush *v.* Western Prec. in Chancery, 530.

Mayor of Cardiff *v.* Cardiff Waterworks Company, 4 De G. & J., 596.

Goodson *v.* Richardson, L. R., 9 Chan., 221.

Federal Cases:

Mr. Justice McLean (U. S. S. Ct.), writing the opinion of the Circuit Court in Spooner *vs.* McConnell, 1 McLean, 355, said: " Must the right of the " complainant be established at law before he can " claim an injunction? This is earnestly contended " by the defendants. Whatever doubts may have " formerly existed on this subject there seems to be " no ground for it at this day. The injunction is " issued because under the circumstances of the " case it is the only adequate remedy."

Perry *v.* Parker, 1 Wood & M., 280.

Hogge *v.* Kansas City Ry. Co., 104 Fed. Rep., 391.

Chancellor Manning, of Michigan, said in White *vs.* Forbes, 1 Walker, 113: "This Court may stay " or prevent nuisances by injunction. Sometimes " the claimant is required to establish his right at " law before equity will protect him by injunction " in the enjoyment of it; *but that is only when the*

" *right on which he bases his claim to the interposi-*
" *tion of the Court is doubtful and in dispute.*"

And Eden on Injunction expresses the law thus:
" As the matter complained of is not, therefore,
" *ipso facto* a nuisance, but may be so, according
" to circumstances, it becomes necessary to ascer-
" tain those circumstances by verdict; *but where it*
" *is in itself a nuisance, the Court (if there is suffi-*
" *cient evidence of its existence) is competent to re-*
" *strain it without a verdict.*"

Eden on Injunctions, 3rd Am. Ed. (Waterman), Vol. 2, p. 274.

See also Spelling on Injunctions, 2 Ed., Vol. 1, Secs. 20 and 21.

(*h.*) *The right of the appellees to the injunction does not depend upon the exercise of judicial discretion. Where the injunction is sought as the remedy for the diversion of a water course, the right to it is substantially absolute.*

There is a class of acts which being lawful in themselves yet resulting in pecuniary damage to others equity will enjoin because of the damage, *i. e.*, because of the results of the act.

Such acts are usually violations of the maxim that one should use his own property in such a manner as not to injure that of another.

There is another class of acts which being unlawful in themselves equity will enjoin because of their unlawful character, without regard to the pecuniary damage. The injunction is granted solely because of the nature of the act.

To this class belong direct invasions of right, the continued appropriation of another's property, continuing trespasses and continuous nuisances in which, as we have seen, the legal remedy of abatement and the legal remedy of damages are inadequate (*vide supra*, pp. 34-39).

In the first class of cases the act being in itself lawful there is a discretion in equity to what extent

it will control it. In the second class of cases, the act being in itself unlawful and incapable of redress at law, equity always grants the injunction. In the second class of cases the discretion of equity has become a mere matter of theory.

Where, as in the case of a diverted stream, there is a wrongful taking of property, to the restoration of which the plaintiff is entitled, and there is no remedy known whereby that restoration can be secured save by the injunction in equity, it is not too much to say that the right to the injunction is absolute. There is no discretion in the Court.

VI.

Concerning certain cases cited by the appellant's counsel and in the dissenting opinion.

Brickett *v.* Haverhill Aqueduct Co., 142 Mass., 394; Banigan *v.* City of Worcester, 30 Fed. Rep., 392; Manville *v.* City of Worcester, 138 Mass., 89:

These cases are thoroughly discussed and disposed of by the Court below in its opinion and it is quite unnecessary to add anything to what is said there. Each case was an action for damages by a riparian owner in Rhode Island for damage to riparian rights resulting from an act committed in Massachusetts under the authority of the law of that State. As each action was for damages, it is obvious that in each case the party aggrieved confirmed the taking, submitted himself to the jurisdiction of Massachusetts and sought the compensation which the wrongdoer was willing to pay. This is sufficient to distinguish these cases from the case at bar. In the late case of Mulhall *v.* Fallon, 176 Mass., 266, Chief

Justice Holmes, who wrote the opinion in the case of Mannville *v.* City of Worcester, comments on the decision in the latter case quite in line with the comments of the Court below in this case, and so limits the decision as largely to eliminate from the dicta in the opinion support for the contentions of the appellants here.

Head *v.* Amoskeag Manufacturing Co., 113 U. S., p: 7

This case is cited in the dissenting opinion in the Court below. But it involved no interstate element. The stream in question there was wholly in New Hampshire, and all rights and remedies arose and existed under one system of laws. The question there arose under the flowage acts of New Hampshire. The decision goes no further than to hold that the flowage acts of that State rest not upon the power of eminent domain, but upon the element of user in common—one of the constituent elements of riparian property—and that such flowage acts are not unconstitutional and cannot be said to take property without due process of law. But the essential distinction between the case of Head *v.* Amoskeag Manufacturing Co. and the case at bar is that the former was a case between riparian owners—a mere question of regulating riparian uses within the dominion of a single State. This is not true of the case at bar, which is a controversy between riparian owners in one State and a non-riparian claimant in another State, where the latter seeks to wrest the riparian property wholly from the riparian owners and apply it to non-riparian uses. (See also Wurts *v.* Hoagland, 114 U. S., 606; Matter of Tuthill, 163 N. Y., 133.)

United States *v.* Rio Grand Irrigation Co. 174, U. S. 690:

This case is cited by the City's counsel as authority for the contention that a State may change its

common law rule in respect to riparian rights or property, and permit the appropriation of flowing waters for such purpose as it deems wise. It is hardly necessary to state that in this proposition counsel for the appellees substantially agree. As a proposition of law it seems to be quite elementary. But it is certainly to be taken subject to the provision for compensation to private owners, within the State, deprived thereby of their property, and it is to be limited to the dominion of the State. No extra-territorial injury can be inflicted nor can the law authorizing the change have an extra-territorial effect. To this extent this Court was careful to limit all that it said in the case of the United States *v.* Rio Grande Dam & Irrigation Co. Referring at page 704 of the opinion to the irrigation statutes of some of the western States and to their undoubted effect in changing the common law status of riparian property this Court said:

"*So far as those rules have only a local significance* " *and affect only questions between citizens of the* " *State, nothing is presented which calls for any* " *consideration by the Federal courts.*" And at every point in its opinion this Court was careful to limit the power to change the law governing the status of riparian property to "*the dominion of the State.*" Therefore, every element is eliminated from the case which could make it authority in a case involving the diversion of an interstate stream.

Pennsylvania Coal Co. *vs.* Sanderson, 113 Pa. St., 126:

This case held that the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners are subject to the results of working coal mines draining naturally into the stream and must *ex necessitate*, give way to the

interests of the community in order to permit the development of the natural resources of the country. It is the leading case sustaining a rule of property law developed in the State of Pennsylvania out of its vast mining interests, and, in the nature of things, is limited to the dominion of that State. Appellees' counsel are unable to see in it anything applicable to the case at bar, for it involved no interstate element and they do not contest the sovereign right of one of the States within its own dominion to make its property law what it will. But this Pennsylvania case is relied upon by the City's counsel to establish the point that because the public interest of New York may be said to necessitate the diversion of this river, the property rights of these appellees in Connecticut must give way. It is difficult to discern the application of the Pennsylvania doctrine to the case at bar. The appellee's counsel deem it sufficient to suggest that this Pennsylvania rule or doctrine is not recognized in the law of Connecticut and has been very recently expressly and wholly repudiated by the Court of Appeals of the State of New York. That Court, in Strobel *v.* Kerr Salt Co., 164 N. Y., 319, referring to this Pennsylvania rule and to the case of Pennsylvania Coal Co. *vs.* Sanderson, said: "We have never adopted that rule in this State and "no public necessity exists therefor, even if it would "ever warrant the courts in relaxing rules for the "protection of property of small value in the in- "terest of some business required to develop the re- "sources of the State, in which much capital had "embarked, giving employment to a great number "of people."

Parker *vs.* Winnipiseogee Cotton & Woolen Co., 2 Blacks Rep , S. Ct. of U. S., 545:

In this case this Court refused to interfere when the Circuit Court had refused the injunction. But the case involved no interstate element. It was a

simple question of a conflict of rights between riparian owners in New Hampshire. The rights of both parties, the Court points out, were involved in doubt, and a trial at law was necessary to determine these disputed rights. "The appellant," said this Court, at page 553, "can have no standing in a court "of equity until he has laid this foundation for "relief. This objection is fatal to the case. We "decide nothing else."

But, in the case at bar as already pointed out, there is no dispute as to legal rights and titles, and no question as to facts.

VII.

Concerning the defendant's claim that there is an improper joinder of parties and that the bill should therefore have been dismissed.

It is submitted that there is no improper joinder of parties plaintiff. It is the universal rule that such a joinder of parties plaintiff as exists in this case is proper in an injunction case of this character.

Story's Equity Jurisprudence, Sec. 279.

Adjacent or neighboring owners of realty may unite in a bill to enjoin a common nuisance.

Watertown *vs.* Cowen, 4 Page's Chancery, 510;
Murray *vs.* Hay, 1 Barbour's Chancery, 59;
Cadigan *vs.* Brown, 120 Mass., 493;
Taylor *vs.* Bay City Company, 80 Mich., 77;

Mitchell *vs.* Thorn, 134 N. Y., 536.
Ballou *vs.* Inhabitants of Hopkintown, 4 Gray, 324.

Even if there were an improper joinder it is too late now for the defendant to raise the objection. It could be raised by the defendant only by demurrer, plea or answer.

See Oliver *vs.* Platt, 3 Howard, 412.
Livingston *vs.* Woodward, 15 Howard, 546.

VIII.

The history of the law touching the point at issue presents an unbroken line of authorities in support of the views expressed above in favor of the appellees.

1825 Slack *v.* Walcott, 3 Mason, 517, Judge Story said:

"It is true that a state has jurisdiction over the "waters of the rivers which flow within its boun- "daries and may by its laws regulate the title, "enjoyment and use of them while and so long as "they flow within its boundaries. But its author- "ity stops here. The right to the use of the same "waters when they flow beyond its boundaries is "not within its control. The title is not acquired "under the laws of such State."

1830 Farnham *vs.* Blackstone, Canal Company, 1 Sumn., 46:

This case also came up before Judge Story. The litigation involved the question of interference by one State with a river flowing in another State. The defendant's counsel conceded that no authority

existed for the enactment of a law in one State adversely affecting riparian rights in an adjoining State. Judge Story in his opinion referred with gratification to the stipulation of the defendant's counsel in that it relieved the Court from considering a point of great importance.

1845. United States *vs.* Ames, 1 Wood. & Min., p. 76.

In this case the question arose as to the interference with the manufacturing operations of the United States Government, carried on upon a piece of land ceded to the Government by the State of Massachusetts. The interference was alleged to be under a statute of eminent domain, passed by the Legislature of the State of Massachusetts, authorizing certain acts by defendant in respect to a water course which, traversing the State of Massachusetts, passed through the tract of land so ceded to and in use by the United States Government. Judge Woodbury, who heard the case, reached the conclusion "that as the land so ceded "was for all the purposes of the case before him "extra-territorial to Massachusetts, a statute of "Massachusetts was no justification for the inter-"ference with the water rights of the United States "within the ceded territory."

1855.

In December of this year, Gov. Pollock, of Pennsylvania, asked the opinion of the Attorney General on the question of the right of the State of New York to divert the water of the Chemung River. It seems that the State of New York had erected a dam across the Chemung River within the State of New York. That river rises in Pennsylvania and flows thence into New York, and after traversing a portion of the latter State, flows again into Pennsylvania, and empties into the Susquehanna. The purpose of the dam erected in New York was

to divert the water of the Chemung River from its natural course through the State of Pennsylvania in order to supply the Chemung Canal in the State of New York. The Chemung Canal discharged its water into Seneca Lake, whence it passed into Lake Ontario, so that by the diversion the waters of the Chemung River were entirely cut off from their natural channel in the State of Pennsylvania. The Attorney General of Pennsylvania (Thomas E. Franklin), to whom the question was submitted, in his opinion, said: "The dominion of "a State includes the lakes enclosed within it and "the rivers which flow through its territory; but "the running water of a river cannot be appropri- "ated either by a State or its inhabitants in such "manner as to prevent its natural flow into the "territories of a State below and thus to deprive "the lower State or its inhabitants of the use of "the river or its water in as beneficial a way as "they would be otherwise able to enjoy it."

4 American Law Register, p. 385.

1881. Rutz *vs.* City of St. Louis, 7 Fed. Rep., p. 438.

In this case the City of St. Louis, under authority of a statute of the State of Missouri, had erected a structure within said city, on the banks of the Mississippi River, the result of which was to so interfere with the current of that river as to injure by the washing of its waters, the land of the complainant Rutz on the opposite side of said river in the State of Illinois. The structure erected by the City of St. Louis was for the purpose of improving the navigation of the Mississippi River at the point in question. Rutz commenced an action at law for damages against the city. The city demurred to his complaint. The Court overruled the demurrer and Judge Treat, in rendering the opinion, held that a State may authorize a structure within its own boundaries upon a navigable river for the purpose of improving navigation, which,

without such authorization, would be considered a nuisance, and its own citizens must accept the legal consequences, though not without recovery of damages, but the citizens of an adjoining State whose property in that State was injured by the erection of said structure are not subject to such legal consequences.

1884. Holyoke Water Power Company *vs.* Connecticut River Company, 52 Connecticut, 570.

In this case the plaintiff was a Massachusetts manufacturing corporation, having its works at Holyoke, in Massachusetts, on the Connecticut River. The defendant was a Connecticut corporation formed for the purpose of improving the navigation of the Connecticut River within the State of Connecticut with power to construct canals, dams, &c., acting under statutes of eminent domain of the State of Connecticut. The defendant established a dam on the Connecticut River within the State of Connecticut, the result of which was to set the water of that river back upon the manufacturing works of the plaintiff within the State of Massachusetts, overflowing their lands and interfering with their operations. The suit was for an injunction. The Court granted the injunction. Judge Shipman, who tried the case, said in his opinion:

> "Jurisdiction confers the power and the "right to inflict consequential injury, but "when no jurisdiction exists the right ceases "to exist. It is a recognized principle that "the statutes of one State in regard to real "estate situate in another State cannot act "extra-territorially. As Connecticut has no "direct jurisdiction or control over real estate "situate in another State, it cannot indi-"rectly, by virtue of its attempted improve-"ment of its own navigable waters, control or "subject to injury foreign real estate."

1894.

In this year the City of Boston initiated a movement to secure from the Legislature of the State of Massachusetts the right to take water from the Nashua River for the supply of the inhabitants of Boston. The Nashua River rises in Massachusetts, flows thence into New Hampshire, where it empties into the Merrimac River in New Hampshire. The owners on the Nashua River in New Hampshire, apprehending injury in case the proposed diversion was effected, retained Messrs. George B. French and Jeremiah Smith* of the New Hampshire bar as counsel, and obtained from them an opinion which in an exhaustive examination of the cases and text books leaves nothing to be desired. The opinion was emphatically against the power of the State, even under the act of the Massachusetts Legislature, to divert the river. It would seem that the City of Boston abandoned its plan. The opinion of Messrs. French and Smith was printed in the Harvard Law Review, Vol. 8, page 138, under the title "Power of a State to Divert an "Interstate River."

The last contribution to the law on the subject under discussion would seem to be the learned opinion of the trial Judge of the Circuit Court in the case at bar as affirmed by the Circuit Court of Appeals. Upon him, at the close of his long and honored career, has devolved the task of declaring one more principle in defense of the integrity of private property and the maintenance of private rights against governmental aggression. He has declared the law and laid out the land-marks in accordance with fundamental principals and time honored authorities, and it is submitted that no valid reason can be presented for the reversal of his decision upon this appeal.

*Formerly Justice of the Supreme Court of New Hampshire and one of the faculty of the Harvard Law School.

IX.

The decision of the United States Circuit Court of Appeals for the Second Circuit should be affirmed.

New York, February 11, 1902.

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Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof, Appellants,

vs.

SAMUEL PINE and FREDERICK MULLER, Appellees.

No. 491.

ADDITIONAL BRIEF FOR APPELLEES FILED AFTER ORAL ARGUMENT.

Near the close of the oral argument of this case several questions were put by certain of the Justices to the counsel for the appellees, a consideration of which has convinced the counsel that they had failed to make clear in the beginning of their argument one of their fundamental premises (see Original Brief, Point I. (a) and Point II).

That premise is this: That the property which has been taken is not property in water, but the right to the current or flow of the stream; that this right is real estate located in Connecticut, and, therefore, not subject to the jurisdiction of New York in any respect either as to the statutes of its Legislature or as to the processes of its Courts.

Counsel understood this question to be asked:

" Suppose the use of this water was vital to the " interests of the people of the City of New York?"

The answer is that if the property of these complainants in the flow of the Byram River is property inseparably attached to and a constituent element of their freeholds in Connecticut, then it is real estate in Connecticut and cannot be reached by the statute of the State of New York, and it makes no difference how great is the necessity of the City of New York. It would seem axiomatic that one State cannot, through the operation of its laws or the process of its courts, take real estate situated in another State, no matter how great the necessity.

This question it was understood was also asked:

" If the water, before it gets to you is in another " State and that State deals with it and the water " never comes to you, so that you do not reduce it to " possession, is not your action one in damages and " are you not put in a position where you cannot " complain that your property has been taken with- " out due process of law, because it is taken before " it comes to you?"

This question embraces the very gist of the controversy and would seem to express, what we conceive to be, the City's theory of the law, but with all deference we submit that the question is based on a view of riparian property without support in the common law and antagonistic to the law of riparian property as established in Connecticut and in New York. The question assumes that there is property in the water and that there is a divisibility or apportionment of the water possible according to lines of ownership, and, therefore, according to State lines or jurisdictional lines, but such is not the case. There

is no property in the water and no possession of the water—the property is in the flow of the stream, in the *flux*. This case does not involve the question of property in water as an element. It is a case of *riparian* property, not of water. * Blackstone says: "The property is in the current." The flow is an entire thing; in the nature of things it cannot be considered as anything else than an entirety. As such an entirety it extends from the source of a river to the mouth. This flow cannot be interrupted at any point without being interrupted at every point and real estate thereby taken *pro tanto*.

This idea of the property being [redacted] in the flow as an entirety lies at the very base of the common law of riparian property and as a basic principle, it has been repeatedly reaffirmed by the Courts of Connecticut and of New York and incorporated into the very life and being of riparian property in those two States.

It has received express recognition in the opinions of this Court. Thus, in Sturr *v.* Beck, 133 U. S., 547, the learned Chief Justice defined the right of a riparian proprietor of land bordering upon a running stream to be the benefit to be derived from *the flow of its waters*, and in United States *vs.* Rio Grande Company, 174 U. S., p. 702, a learned associate Justice defined the right or property *as in the continuing natural flow*.

We have said above that this right to the undiminished flow is real estate, and so the common law, the law of Connecticut and the law of New York, regard it. It is not a mere easement, it is not a personal right. It is more even than an incorporeal hereditament. It is a corporeal hereditament. It is, therefore, property, *tangible* and *visible*, according to the definition of a corporeal hereditament. It is not a mere right in the freehold of Pine

* See Chitty's Blackstone, Vol. 1, Book 2, Star page 403.

and the freehold of Muller, but is part of each of those freeholds; a constituent element in the legal conception of real property in those freeholds. The Courts of Connecticut and the Courts of New York have used every expression apt to express this idea. They have said it was "parcel of the land itself," part of the freehold, "of the substance of the inheritance." The Supreme Court of Connecticut, in Wadsworth *v.* Tillotson, 15 Ct., p. 372, defined it thus:

"Every proprietor of land through which a nat-
" ural water course runs has an equal right to the
" use of the water for every useful purpose to which
" it can be applied, as it is wont to run without
" diminution or alteration. *This right is not an*
" *easement or appurtenance, but is inseparably an-*
" *nexed to the soil, and is parcel of the land itself.*"

And in Harding *v.* Stamford Water Company, 41 Ct., p. 92, they reaffirm and amplify this legal principle:

"These defendants then *can have no more right*
" to divert the water of this stream from the land
" of the plaintiffs or to use the same, except in a
" reasonable manner for proper purposes as it passes
" over their lands, *than they have to take the mill of*
" *the plaintiffs or the land on which it stands and*
" *appropriate them to their own or to the public*
" *use.*"

The New York Court of Appeals after an elaborate consideration of the precise nature of this right to the undiminished flow of the stream, in Scriver *v.* Smith, 100 N. Y., p. 471, declared that while the right has some semblance to an easement it is not, in fact, a real easement, but a corporeal right. It adopts there, at page 479, the definition of Washburn on Easements, 19, as follows:

"The term 'natural easements,' as ap-
" plicable especially to the case of flowing

"water, is often made use of by courts of "common law, and is not likely to mislead "the reader, inasmuch as the context usually "shows in what sense the term is employed. "But, as will appear hereafter that an ease- "ment, when technically considered, is an in- "terest which one man has in another's es- "tate by grant, or its equivalent—prescrip- "tion, it seems at first thought to be incon- "sistent to characterize what belongs to an "estate as inseparably incident thereto and "forming part and parcel thereof, by the "name of easement or servitude. It may be "in many respects, and perhaps most respects, "like an easement and may be treated ac- "cordingly, and yet will hardly come within "the requirements of what constitutes an "easement at common law."

And again, quoting from Mr. Washburn, the Court says:

"The right of enjoying this flow without "disturbance or interruption by any other "proprietor is one *jure naturæ* and is an in- "cident of property in the land, not an "appurtenance to it, like the right he has to "enjoy the soil itself in its natural state un- "affected by the tortious acts of a neighbor- "ing land-owner. It is an inseparable inci- "dent to the ownership of land, made by "an inflexible rule of law an absolute and "fixed right, and can only be lost by grant or "twenty years adverse possession."

And in the same case the Court quotes approvingly the definition of Angell on Water Courses, Sec. 90:

"The right to the use of the flow of water "in its natural course and to the mainte-

"nance of its fall on the land of the proprietor "is not what is called an easement, because "it is inseparably connected with and inher- "ent in the property in the land; it is a parcel "of the inheritance and passes with it."

The Court also quotes with approval the definition of Judge Erle in Stokoe *v.* Singers, 8 Ell & Bl., 31 —"The right to the natural flow of water is not an "easement, but a natural right"; and the definition of Chief Justice Shaw in Johnson *v.* Jordan (2 Metc., 234) "It is inseparably annexed to the soil "and passes with it, not as an easement, not as an "appurtenance, but as parcel."

The New York Court of Appeals concludes this exhaustive review of the subject as follows—"Ease- "ments proper are incorporeal rights, but the right "to have water flow in its natural channel is a "corporeal right."

By the statute law of New York it is expressly declared that the terms real property and land as used in the Real Property Law of New York are co-extensive in meaning lands, tenements and hereditaments.

N. Y. Real Property Law, Chap. 547, Laws 1896, Art. 1, Sec. 1.

The learned Chief Justice of this Court in his opinion in Sturr *v.* Beck, 133 U. S., 547, fully recognized and adequately expressed this basic principle of common law riparian property when he said that the right of the riparian proprietor to the flow of the stream is "*a natural incident to or one of the elements of his estate.*"

This right to the undiminished flow of the stream existing in the complainants in this case is, therefore, real estate and part and parcel of their freeholds in Connecticut, and, it is submitted that the City of New York cannot take that real estate in Connecticut through any statute of eminent domain

enacted by the Legislature of New York. To do so is to take property without due process of law contrary to the provisions of the Federal Constitution.

It is true that the nature of this property is such and the natural conditions comprised in the territory of New York and Connecticut are such that New York has the physical power to take this real estate, but a distinction must be drawn between physical power to take this real estate in Connecticut and the legal right to take it. If New York cannot operate these public works and utilize the Byram River within the State of New York without divesting vested rights in Connecticut and taking real property there, then New York must cease to operate these public works, and must refrain from diverting the Byram River even within its own territory. It is the exercise of physical power in absence of legal right to divert an interstate stream and thereby to take property outside of the jurisdiction of the act of diversion that makes such diversion *casus belli*, as counsel for the appellees contend, in international law. It is the moral wrong that is done, the use of physical power unsupported by moral or legal right that lays the basis for a just cause of war.

If the City of New York had taken condemnation proceedings under the Condemnation Law of New York and had served process upon Pine and Muller it could not have divested them of this riparian property, to wit, the right to the undiminished flow of the Byram River, for that right being real estate in Connecticut was beyond the effect of the statute of New York and beyond the process of her courts. No jurisdiction of that real estate could be acquired, even though jurisdiction of the persons of Pine and Muller was acquired, for it is only personal rights and personal property that follow the person. Rights in the nature of realty, especially when they have the status of corporeal rights inhere in the land and their *locus in quo* is the *locus in quo* of the land,

and they are subject only to that jurisdiction which embraces the land.

This question it was understood was also asked:

"*Do you contend that under the common law, but* "*where there is a constitutional limitation against* "*taking of property the nature of the riparian* "*right as property is such that the law making au-* "*thority, although it could not take property with-* "*out compensation, could not define the nature and* "*extent of the riparian ownership, and the legal* "*nature and character of the use to which the flow-* "*ing water should be put?*"

This is in a measure answered by much that is said above. Of course, the law makiug authority may change the nature and extent of the riparian right and property as to all real estate within the jurisdiction of the law making power, making compensation to owners whose real estate within such jurisdiction might be thereby taken, but it cannot directly or indirectly, even as the result thereof, change the legal nature and character of riparian ownership outside of the jurisdiction of such law making power, nor alter the incidents of or detract from the estates of riparian owners outside of such jurisdiction. To do so would be to divest vested rights in realty outside of the jurisdiction of such law making power, and to take away *pro tanto* the extra-territorial real property of riparian owners. To do this, as we have frequently asserted in this case, is *casus belli* in international law, as between independent nations, but under the Constitution of the United States and the union of the States, it is a taking of property without due process of law. It is, therefore, unconstitutional and void, and owners aggrieved thereby have a constitutional right for redress in the Courts of the United States, who must restore to them their property.

The use of the injunction for this purpose ~~and a consideration of it~~ as the only remedy whereby property of this nature can be restored to its rightful owner has been fully considered under Point V. of the original brief, and was discussed at length on the oral argument.

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NEW YORK, March 8, 1902.